

Vito, Robert

June 19, 2007

Philadelphia, PA

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

- - -

IN RE: PHARMACEUTICAL : MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION:
PRICE LITIGATION : 01-CV-12257-PBS
:
THIS DOCUMENT RELATES TO :
U.S. ex rel. Ven-A-Care of :
the Florida Keys, Inc. v. :
Abbott Laboratories, Inc. :
No. 06-CV-11337-PBS :

- - -

Videotaped deposition of ROBERT
VITO was taken, pursuant to notice, at MORGAN
LEWIS & BOCKIUS, LLP, 1701 Market Street,
Philadelphia, Pennsylvania, on Tuesday, June
19, 2007, beginning at 9:10 a.m., before M.
Kathleen Muino, Professional Shorthand
Reporter, Notary Public; Michael Hunterton,
Certified Legal Video Specialist, there being
present:

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202-220-4158

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<p>1 CMS?</p> <p>2 A. Yes. She works with Larry Reed.</p> <p>3 Q. Okay. Do you recall having any</p> <p>4 conversation along those lines with state</p> <p>5 pharmaceutical representatives?</p> <p>6 A. I don't recall any. That doesn't --</p> <p>7 doesn't mean that there -- we -- I didn't, but I</p> <p>8 just don't recall any.</p> <p>9 Q. Do you recall if, in your discussions</p> <p>10 with Mr. Reed and Ms. Duzor, that they were</p> <p>11 conveying what they had heard from state</p> <p>12 representatives?</p> <p>13 A. I don't understand your question.</p> <p>14 Q. Let me try it again. You indicated that</p> <p>15 you recall discussions with Mr. Reed and Ms. Duzor</p> <p>16 about potential need to, if you were going to lower</p> <p>17 one aspect of reimbursement, you might have to</p> <p>18 increase the other aspect of reimbursement in order</p> <p>19 for --</p> <p>20 A. To pay fairly.</p> <p>21 Q. To pay fairly. Do you recall if they,</p> <p>22 Mr. Reed and Ms. Duzor, were expressing comments</p>	<p>1 ---</p> <p>2 (Whereupon, a recess was taken.)</p> <p>3 ---</p> <p>4 (Whereupon, Exhibit Abbott 235 was marked</p> <p>5 for Identification.)</p> <p>6 ---</p> <p>7 THE VIDEOGRAPHER: The time is 3:12 p.m.</p> <p>8 We're going back on the record, starting Tape No. 5</p> <p>9 in the deposition of Robert Vito in the matter of</p> <p>10 In RE: Pharmaceutical Industry Average Wholesale</p> <p>11 Price Litigation.</p> <p>12 BY MR. TORBORG:</p> <p>13 Q. Welcome back, Mr. Vito.</p> <p>14 A. Thank you.</p> <p>15 Q. I've handed you, as Exhibit Abbott 235,</p> <p>16 it's a document titled, Declaration of Robert</p> <p>17 A. Vito, that attaches a HHS-OIG Privilege</p> <p>18 Log, and if -- if we look at page -- the last page</p> <p>19 of the actual Affidavit, is this something that you</p> <p>20 signed on April 20th, 2007?</p> <p>21 A. Yes.</p> <p>22 Q. Mr. Vito, do you recall this Affidavit</p>
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<p>1 that they had heard from their state counterparts</p> <p>2 or something that was their own personal view?</p> <p>3 MR. AZORSKY: Objection --</p> <p>4 THE WITNESS: I don't know --</p> <p>5 MR. NEAL: I'll object to the form.</p> <p>6 THE WITNESS: Yeah, I -- I don't know.</p> <p>7 It would be better to ask them. I -- I don't know.</p> <p>8 MR. NEAL: Dave, why don't we go ahead</p> <p>9 and take a short break now.</p> <p>10 MR. TORBORG: Let me -- I'm almost done</p> <p>11 with this section. I think I'm done, but --</p> <p>12 MR. NEAL: Okay.</p> <p>13 MR. TORBORG: -- just give me one second.</p> <p>14 MR. NEAL: Sure.</p> <p>15 MR. TORBORG: Okay. Yeah, we can take a</p> <p>16 break.</p> <p>17 MR. NEAL: Thank you.</p> <p>18 THE VIDEOGRAPHER: The time is 2:54 p.m.</p> <p>19 We're going off the record, concluding Tape No. 4</p> <p>20 in the deposition of Robert Vito in the matter In</p> <p>21 Re: Pharmaceutical Industry Average Wholesale Price</p> <p>22 Litigation.</p>	<p>1 --</p> <p>2 A. Yes.</p> <p>3 Q. -- or this declaration, I should say?</p> <p>4 A. Yes.</p> <p>5 Q. And who drafted this declaration?</p> <p>6 A. I believe legal counsel.</p> <p>7 Q. Did you review the declaration?</p> <p>8 A. Yes.</p> <p>9 Q. Did you draft any of the language in the</p> <p>10 declaration?</p> <p>11 A. I -- I don't know I drafted [sic], but I</p> <p>12 -- if there were issues or concerns or anything</p> <p>13 like that, I -- I would bring it to the counsels'</p> <p>14 attention.</p> <p>15 Q. Did you provide line edits to the draft?</p> <p>16 MR. AZORSKY: Object to the form.</p> <p>17 MR. NEAL: I'll object to the form as</p> <p>18 well.</p> <p>19 THE WITNESS: I did provided edits.</p> <p>20 BY MR. TORBORG:</p> <p>21 Q. Do you recall what edits you provided?</p> <p>22 A. I do not recall what edits I provided.</p>

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<p>1 Q. Was it -- was it a -- an extensive 2 amount of edits -- 3 MR. AZORSKY: Objection -- 4 BY MR. TORBORG: 5 Q. -- or not? 6 MR. AZORSKY: -- to form. 7 MR. NEAL: I'll join the objection. 8 You can answer. 9 THE WITNESS: I don't think it was. 10 BY MR. TORBORG: 11 Q. Did you have an understanding of why it 12 was that you were asked -- well, let me strike 13 that. 14 Were you asked by legal counsel to sign this 15 declaration? 16 A. Yes. 17 Q. I ask you to go to Page 3, Paragraph 6. 18 The Affidavit states: I am informed that documents 19 in the possession of OIG have been requested in the 20 course of the above-captioned litigation. I 21 requested that certain of these documents not be 22 produced.</p>	<p>1 MR. AZORSKY: Objection to form. 2 THE WITNESS: I believe when we met with 3 them, made it clear that certain things I thought 4 were internal discussions and should be kept that 5 -- that way. 6 BY MR. TORBORG: 7 Q. Now, this Affidavit attaches a privilege 8 log, correct? 9 A. It appears to have one, yes. 10 Q. Paragraph 8 of your declaration 11 indicates it lists 248 documents; is that right? 12 A. I did not count them, but I believe it's 13 right. 14 Q. Okay. And did you pull those 248 15 documents out of a collection yourself, or did 16 legal counsel bring them to you and ask you to 17 assert the privilege over them? 18 A. I believe that I told legal counsel 19 there were certain areas where I felt it would be 20 very chilling if our discussions became -- were 21 made public, so I pointed out to them those 22 particular areas.</p>
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<p>1 Mr. Vito, did you request that certain 2 documents not be produced? 3 A. Yes. 4 Q. When did you do -- when did you do that? 5 A. When I met with legal counsel. 6 Q. And when did you meet with legal 7 counsel? 8 A. The dates are beyond me. Within the 9 last two or three months. 10 Q. Who selected the -- the documents that 11 would not be produced? 12 MR. AZORSKY: Objection to form. 13 MR. NEAL: I'll join the objection. 14 THE WITNESS: I believe that the counsel 15 was involved in that, but I made suggestions to 16 them about issues that I thought needed to be 17 protected. 18 BY MR. TORBORG: 19 Q. When did you first become involved in 20 asserting the deliberative process privilege over 21 documents? 22 MR. NEAL: I'll object to the form.</p>	<p>1 Q. So legal counsel collected the 248 2 documents and put them all in a log and then asked 3 you to assert the privilege over them; is that 4 right? 5 MR. AZORSKY: Objection -- 6 MR. NEAL: I'll object to the form. 7 MS. CONNOLLY: Objection to form. 8 THE WITNESS: I don't think that that's 9 the -- the correct characterization. I believe 10 what happened was, when we met with them, I told 11 them specifically there were indications -- when we 12 were having team meetings, when we were having exit 13 conference and -- and -- and when we were having 14 discussions relating strictly to the product, that 15 that information should not be made available 16 because people were having honest, open discussions 17 that would help them come up with the best 18 methodologies, the best type of reviews, understand 19 both -- all the weaknesses and the strengths, and 20 if people knew that that would be made in the 21 public document, it would have a stifling effect on 22 our work.</p>

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<p>1 the documents in there to see what they said and</p> <p>2 what the things were that were on there.</p> <p>3 Q. I -- I think you testified earlier,</p> <p>4 correct me if I misunderstood you, that you haven't</p> <p>5 reviewed each of the documents --</p> <p>6 A. I -- I --</p> <p>7 Q. -- on the log, correct?</p> <p>8 A. I -- I have not looked at this and then</p> <p>9 looked at the other document. If I remember</p> <p>10 correctly, if -- if -- if -- if the folder -- I</p> <p>11 believe there was a folder, and I did look at that</p> <p>12 folder, but I may be mistaking, but I -- I -- I</p> <p>13 think that it was in -- in a folder, and I think I</p> <p>14 looked at some of these. I --</p> <p>15 Q. Some of these?</p> <p>16 A. Yes -- well, I --</p> <p>17 Q. You haven't --</p> <p>18 A. I -- I --</p> <p>19 Q. -- reviewed all of the documents, right?</p> <p>20 A. Well --</p> <p>21 MS. LIANG: Object --</p> <p>22 MR. NEAL: I'll object to the form.</p>	<p>1 Q. How much time did you spend reviewing</p> <p>2 the documents?</p> <p>3 MR. AZORSKY: Objection to form.</p> <p>4 THE WITNESS: I did not spend a great</p> <p>5 amount of time reviewing the documents.</p> <p>6 BY MR. TORBORG:</p> <p>7 Q. Page -- Paragraph 13, you also state: My</p> <p>8 statements in this declaration also are based upon</p> <p>9 information personally known to me or conveyed to</p> <p>10 me by agency personnel who reviewed every one of</p> <p>11 the documents for which the privilege is being</p> <p>12 asserted.</p> <p>13 What agency personnel conveyed information to</p> <p>14 you regarding this -- that would support the</p> <p>15 statements in your declaration?</p> <p>16 A. I believe that it was the counsel.</p> <p>17 Q. So it was the lawyers?</p> <p>18 A. (Indicating.)</p> <p>19 Q. Yes? The --</p> <p>20 A. Yes.</p> <p>21 Q. -- lawyers? What -- what information</p> <p>22 did they tell you regarding the documents that made</p>
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<p>1 MS. LIANG: Object to form.</p> <p>2 THE WITNESS: You know, I -- I -- I -- I</p> <p>3 -- if -- if -- if the folder was the one that I'm</p> <p>4 thinking of, and it had that information in, I</p> <p>5 flipped through each one of them. I don't know</p> <p>6 specifically every detail on every one, and I -- I</p> <p>7 don't -- you could go through here, and I probably</p> <p>8 won't know how many pages are in any of them.</p> <p>9 BY MR. TORBORG:</p> <p>10 Q. Okay. Your -- your declaration</p> <p>11 indicates that you've personally reviewed a</p> <p>12 sampling of the documents?</p> <p>13 A. Yes.</p> <p>14 Q. So should I read that to mean that you</p> <p>15 didn't review all of the documents?</p> <p>16 A. Again, I -- I -- you're probable -- I --</p> <p>17 I -- if -- if -- if -- if I am remembering</p> <p>18 correctly, then I looked at a folder that had them</p> <p>19 in, but I might be not remembering correctly, and</p> <p>20 if I'm -- and if that folder wasn't this folder,</p> <p>21 then you -- you would be correct, in that I did not</p> <p>22 review every one.</p>	<p>1 you feel comfortable about this declaration?</p> <p>2 A. Well --</p> <p>3 MS. LIANG: Objection; attorney-client</p> <p>4 privilege.</p> <p>5 MR. TORBORG: I -- I think that he's the</p> <p>6 one to assert that privilege.</p> <p>7 MR. NEAL: I'll object. Can I have the</p> <p>8 question read back.</p> <p>9 ---</p> <p>10 (Whereupon, the previous question was</p> <p>11 read back.)</p> <p>12 ---</p> <p>13 MR. TORBORG: I -- I think we have a -- I</p> <p>14 mean, a waiver situation at least. I mean he's</p> <p>15 relying on information that's conveyed to him to</p> <p>16 sign an affidavit or declaration. It seems to me</p> <p>17 I'm -- I'm allowed to probe --</p> <p>18 MR. NEAL: Your position's understood.</p> <p>19 Let me -- let me take two minutes and consult with</p> <p>20 agency counsel briefly on this.</p> <p>21 We'll go off the record.</p> <p>22 THE VIDEOGRAPHER: The time is 3:31 p.m.</p>

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<p>1 listed in your declaration, going through Page 12. 2 Do you recall reviewing any of the particular 3 documents? 4 MR. NEAL: Go ahead and review the 5 declaration. 6 THE WITNESS: I -- I'm not sure. 7 BY MR. TORBORG: 8 Q. Who selected these particular documents 9 for inclusion in the actual text of your 10 declaration? 11 A. I believe legal counsel did, but at my 12 direction. When they came, I told them that I 13 believe certain information should be kept 14 internal, and I told them that it had to do with, 15 you know, discussions at exit and entrance 16 conferences, internal discussions in which we had 17 team meetings in which talked about methodology, 18 how things were going to -- the positives and 19 negatives of how to do this particular review. 20 Q. Have you asserted the deliberative 21 process privilege before, in -- 22 A. No.</p>	<p>1 privilege, such that the -- such as the 2 deliberative process privilege, that's not absolute 3 and can be overcome based upon a -- a showing of 4 need or a balancing of factors. 5 Do -- do you have that understanding? 6 A. Yes. 7 MR. NEAL: I'll object -- 8 MR. AZORSKY: Objection. 9 MR. NEAL: I'll object to the form. 10 THE WITNESS: Yes. 11 BY MR. TORBORG: 12 Q. And do you understand that one of the 13 factors is what harm would come to OIG if 14 particular documents were disclosed? 15 MR. NEAL: I'll object to the form. 16 You can answer. 17 THE WITNESS: Yes. 18 BY MR. TORBORG: 19 Q. Why don't we go to the first document in 20 -- on Page 7, HHD900-0638 -- 21 A. Uh-huh. 22 Q. -- through 652. What harm would come to</p>
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<p>1 Q. -- previous litigation? 2 A. No. 3 Q. This is the first time that you've done 4 it? 5 A. I think this is the first time I've been 6 involved in litigation. 7 Q. Okay. Do you understand that the -- the 8 deliberative process privilege is a qualified 9 privilege? 10 MR. NEAL: I'll object to the form. 11 You can answer. 12 THE WITNESS: Qualified in -- in -- in 13 what manner? 14 BY MR. TORBORG: 15 Q. Meaning it's not an absolute privilege, 16 unlike attorney-client privilege, where, generally 17 speaking, it's a absolute privilege pretty much no 18 matter what. Unless there's a crime going on, I'm 19 not allowed to know what you and John talked about 20 with respect to seeking and receiving legal advice, 21 on one hand. 22 On the other hand, there's a qualified</p>	<p>1 OIG if this particular document was disclosed to 2 Abbott in this case? 3 MR. NEAL: I'll object to the form. 4 You can answer. 5 THE WITNESS: It's depending upon what 6 version it was of the report, how -- how many times 7 I had looked at it. What -- what -- what you're 8 talking about now is a document that's given to me 9 the first time in which then I would have to do my 10 review on it, make a determination as to the issues 11 that are involved with it. This -- this is -- 12 usually I get the reports after the team has looked 13 at them, and then I work with the team to make a 14 final product. 15 And many times when this information 16 comes to me I have to go through and we have to 17 talk about the data that they have, the analysis 18 that they've done. All this is in the process that 19 makes us be able to do what we do. Because if I 20 was -- if I knew that you would be getting every 21 piece of information involved in every type of 22 review that we do, it would have a very chilling</p>

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<p>1 effect. I would not be able to communicate as 2 openly and freely and have an open dialogue with my 3 staff on this particular issues. 4 BY MR. TORBORG: 5 Q. How about with respect to a document on 6 -- on page -- why don't we go to the next one on 7 Page 7. What particular harm would come to OIG if 8 this particular document was disclosed to Abbott? 9 MR. NEAL: Objection as to form. 10 THE WITNESS: Again, this -- this allows 11 for my office members to communicate among themselves 12 in a free and open -- a free-and-open environment, 13 to say what they feel, whether that means to be -- 14 whether it has anything to particularly do with 15 this or not. 16 What I'm trying to say is that this 17 allows the communication process that we could talk 18 about what we have, the data we have, their -- 19 their analysis as to how -- how it got there, my 20 questions as it relates to how why this -- why this 21 is done this way, why -- it would just be -- I 22 guess in some ways it would be your first draft and</p>	<p>1 we will not be able to have any more internal 2 discussions and deliberations. 3 BY MR. TORBORG: 4 Q. Do you know what the particular comment 5 was from one staff member to another on March 21st, 6 2001; have you -- have you reviewed that comment? 7 MR. NEAL: Objection as to form. 8 You can answer that yes or no. 9 THE WITNESS: I don't recall. I -- I 10 don't. 11 MR. NEAL: Or I don't recall. 12 BY MR. TORBORG: 13 Q. Do -- do you know if you actually 14 reviewed that particular document? 15 A. I don't recall. I -- I -- I'd just like 16 to tell you that the workload that I have has been 17 very significant, and I have tried to do what I 18 have been asked to do. 19 Q. And I think what I've found out today, 20 and please correct me if I'm wrong, is that you 21 didn't spend a whole lot of time looking at the 22 particular documents. Correct?</p>
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<p>1 you want everybody to see your first draft of a -- 2 a -- a document that eventually goes out, but the 3 first draft is often the area where a large amount 4 of effort is done to talk about what's in here, how 5 they arrived at what they got, and ways to -- that 6 we want to communicate what we found. 7 BY MR. TORBORG: 8 Q. Is there anything in particular about 9 this document and the comments provided by an OEI 10 staff member to another staff member that you think 11 would cause particular harm if it was disclosed to 12 be Abbott? 13 MR. AZORSKY: Objection. 14 MR. NEAL: I'll object to the form. 15 THE WITNESS: I -- I think, again, it has 16 to do with what the discussions -- the -- the 17 people are saying to each other. They -- they 18 might be saying, you know, something that I -- I 19 think would be internal to our office and should be 20 kept internal just to the office, because if 21 information about our internal deliberations and 22 discussions are now becoming public documents, then</p>	<p>1 MR. NEAL: Objection as to form. 2 MR. AZORSKY: Objection. 3 THE WITNESS: I -- I -- I -- 4 BY MR. TORBORG: 5 Q. Or a -- 6 A. I don't -- 7 Q. -- great deal of time, I think are the 8 words you used? 9 MR. AZORSKY: Objection to form. 10 MR. NEAL: The same objection. 11 THE WITNESS: I -- I did not -- I -- I 12 did not spend, yes, the time -- a significant 13 amount of time. 14 BY MR. TORBORG: 15 Q. What particular harm would come to OIG 16 if the first document on Page 7 were disclosed 17 under a protective order in this case; in other 18 words, it wouldn't necessarily go out to the 19 public, it would be limited to use in this 20 litigation? 21 MR. NEAL: Objection as to form. 22 THE WITNESS: Again, I -- I -- I think</p>

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<p>1 the issue at hand is for us to be able to 2 communicate in -- in a manner that keeps the 3 dialogue open between the people who are doing the 4 review and -- and -- and the people that are 5 reviewing the review, as well as being able to 6 communicate the issues at hand. 7 If -- if we were -- if -- if you were to 8 get every document and we knew that it would become 9 public, then I believe it would have a significant 10 stifling effect on our office, in that we would not 11 be able to do any of this type -- what would leave 12 any reference in there about what the discussions 13 were we had. 14 BY MR. TORBORG: 15 Q. I -- I -- I think you misunderstood my 16 last question given the response. You -- you 17 included the comment that it would become public. 18 What I'm asking you here is: What harm would 19 result to OIG if this particular document was 20 disclosed to Abbott under a protective order in 21 this case and not available for public consumption? 22 MR. AZORSKY: Objection.</p>	<p>1 Q. Okay. How many did you review? 2 A. I don't -- I don't actually recall, but 3 I think that I did look at some of those -- 4 Q. Okay. 5 A. -- because I had to go through the -- 6 the files, and on occasions, I did go through 7 those. 8 Q. And is there anything in your review of 9 those documents that -- those specific documents 10 and the comments made in those specific documents 11 that would cause harm to either OIG or CMS if they 12 were disclosed to Abbott in this case under 13 protective order? 14 MR. NEAL: Objection as to form. 15 You can answer. 16 THE WITNESS: I -- I think, again, the 17 discussions that we have with CMS are open 18 discussions that we hope to learn from them and to 19 have an open dialogue that allows us to communicate 20 back and forth. If there -- if we knew that every 21 document that we were sharing with them, that it 22 would become a public document, then it would be</p>
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<p>1 MR. NEAL: Objection as to form. 2 You can answer. 3 THE WITNESS: I -- I, again, think that 4 just for any of our work to be shared before it is 5 ready to be shared, it -- it would have a 6 significant impact on how we would be able to do 7 work in the future. 8 BY MR. TORBORG: 9 Q. And some -- some of these documents on 10 the privilege log go back to the early-1990s, 11 right, at least the mid-1990s; is that fair to say? 12 A. I think so. 13 Q. A number of the -- for example -- well, 14 I'll just ask you to go to Page 6 of 15 of the 15 privilege log. The second to the last entry refers 16 to handwritten notes from an exit conference? 17 A. Yes. 18 Q. Did you review any of the notes or 19 summaries of any of the exit conferences, Mr. Vito? 20 MR. NEAL: I'll object to the form. 21 THE WITNESS: I think I did. 22 BY MR. TORBORG:</p>	<p>1 something that we would be -- have to change the 2 way we do our work. 3 BY MR. TORBORG: 4 Q. And I think you've -- you've done a nice 5 job of summarizing sort of a general purpose of the 6 deliberative process privilege. What I'm trying to 7 figure out is: Is there anything in those 8 particular documents, such as the exit interview 9 notes that you did review some, that causes you to 10 think there would be any particular harm, a 11 specific reason for that specific document, why it 12 would harm OIG or CMS if it was disclosed? 13 MR. NEAL: Objection as to form. 14 You can answer that question to the 15 extent you don't disclose the specific comments -- 16 THE WITNESS: Yeah, I -- 17 MR. NEAL: -- made in exit note -- exit 18 conference reports. 19 THE WITNESS: I think there might be. 20 BY MR. TORBORG: 21 Q. Can you -- can you articulate any 22 specific harm that would come from disclosure of</p>

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<p>1 any particular exit conference note?</p> <p>2 MR. NEAL: Objection as to form.</p> <p>3 You can answer that consistent with my</p> <p>4 last instruction.</p> <p>5 THE WITNESS: I -- I think there are some</p> <p>6 things in there that are said during a</p> <p>7 free-and-open conversation that would not be said</p> <p>8 if -- if there were to become public documents. So</p> <p>9 there are specific items I -- that I think I'm</p> <p>10 certainly aware of that I would not want our</p> <p>11 internal deliberations to make -- make -- make --</p> <p>12 become public.</p> <p>13 BY MR. TORBORG:</p> <p>14 Q. Do you recall, in reviewing any of those</p> <p>15 exit conference notes, thinking to yourself, well,</p> <p>16 that -- that seems kind of relevant to this case?</p> <p>17 MR. NEAL: Objection as to form. Mr.</p> <p>18 Vito's not a lawyer.</p> <p>19 You can answer.</p> <p>20 BY MR. TORBORG:</p> <p>21 Q. Well, you understand the issues that are</p> <p>22 at play in this case, don't you?</p>	<p>1 that I remember had comments that relate strictly</p> <p>2 to what we were doing, why we did it, how we did</p> <p>3 it, and -- and the discussion among -- either</p> <p>4 internally, among my staff and myself, or among our</p> <p>5 staff and CMS.</p> <p>6 BY MR. TORBORG:</p> <p>7 Q. And you reviewed a sampling of them,</p> <p>8 right?</p> <p>9 A. I -- I -- I believe that I reviewed a</p> <p>10 sampling of them, yes.</p> <p>11 Q. When you were making your decision on</p> <p>12 whether to -- well, who -- whose decision was it,</p> <p>13 Mr. Vito, to assert the deliberative process</p> <p>14 privilege in this case?</p> <p>15 MR. NEAL: Objection as to form.</p> <p>16 You can answer.</p> <p>17 THE WITNESS: I believe that I asked the</p> <p>18 counsel to see if they could protect this</p> <p>19 information because it was information that we were</p> <p>20 using as we were doing our reports and information</p> <p>21 that I thought would -- would be stifling our work</p> <p>22 if -- if this information became public. I believe</p>
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<p>1 MR. NEAL: Objection as to form.</p> <p>2 MR. AZORSKY: Objection to form.</p> <p>3 BY MR. TORBORG:</p> <p>4 Q. Generally speaking?</p> <p>5 MR. NEAL: The same objection.</p> <p>6 THE WITNESS: I -- I think that the</p> <p>7 issues that are there relate to multiple items, and</p> <p>8 I -- I believe that it would have a chilling effect</p> <p>9 on our organization if every document and every</p> <p>10 discussion that we had during our review process</p> <p>11 would become a -- made a public document.</p> <p>12 BY MR. TORBORG:</p> <p>13 Q. Did you, in reviewing any of these</p> <p>14 documents, without telling me the substance of the</p> <p>15 document, think to yourself, boy, that's an</p> <p>16 interesting document and would be relevant to the</p> <p>17 lawsuits?</p> <p>18 MR. NEAL: Objection as to form.</p> <p>19 MR. AZORSKY: Objection to form.</p> <p>20 THE WITNESS: The -- the one -- the ones</p> <p>21 that I -- I looked at, I -- I -- I -- I don't</p> <p>22 think. I mean, I -- I -- I just think the ones</p>	<p>1 that I pointed out to the -- our legal counsel,</p> <p>2 when we were looking at some of the documents, and</p> <p>3 told them that I would like these documents to be</p> <p>4 used in a deliberative manner.</p> <p>5 I -- I -- I'm -- I'm not sure that I knew</p> <p>6 all the exact legal terms, but I did say that I</p> <p>7 thought that this information would be information</p> <p>8 that would be not good if it became public, and I</p> <p>9 believe that I gave them the general parameters in</p> <p>10 which I felt that that would fit.</p> <p>11 BY MR. TORBORG:</p> <p>12 Q. When you made the decision to assert the</p> <p>13 privilege, did you consider what relevance any of</p> <p>14 the documents withheld might have to the case?</p> <p>15 MR. NEAL: Objection as to form.</p> <p>16 You can answer that.</p> <p>17 THE WITNESS: I -- I am not familiar with</p> <p>18 all of the documents, but some of them strictly</p> <p>19 relate to the way we did our work, the issues that</p> <p>20 were involved in our work, communication among</p> <p>21 staff about the -- the -- what we did, how we did</p> <p>22 it, the pluses and minuses for doing certain</p>

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<p>1 things.</p> <p>2 BY MR. TORBORG:</p> <p>3 Q. But you didn't do a document-by-document</p> <p>4 review of -- balancing, you know, boy, that might</p> <p>5 be relevant to the case, I'm not sure, I don't know</p> <p>6 all the issues, but that might be relevant to the</p> <p>7 case, vis-a-vis, oh, I really don't want to give</p> <p>8 that one up, it's core to my deliberations; did you</p> <p>9 do that kind of analysis?</p> <p>10 MR. NEAL: I'll object to the form.</p> <p>11 MR. AZORSKY: Objection.</p> <p>12 MR. NEAL: But you can answer.</p> <p>13 THE WITNESS: I don't -- I don't -- I did</p> <p>14 not do that type of analysis.</p> <p>15 BY MR. TORBORG:</p> <p>16 Q. You'll be happy to know that I'm moving</p> <p>17 on. I'd like to turn now to the work that your</p> <p>18 office did related to albuterol sulfate in the</p> <p>19 mid-1990s.</p> <p>20 A. Yes, we did a lot of reports on</p> <p>21 albuterol sulfate.</p> <p>22 MR. TORBORG: I want to skip that one.</p>	<p>1 suppliers' acquisition --</p> <p>2 A. Okay.</p> <p>3 Q. -- report, to the purpose on -- under</p> <p>4 the Executive Summary. In that report, you were</p> <p>5 examining suppliers' acquisition costs for</p> <p>6 albuterol sulfate and comparing it to Medicare</p> <p>7 allowances; is that right?</p> <p>8 A. Yes, we were getting the acquisition</p> <p>9 costs from suppliers and then comparing that to the</p> <p>10 Medicare allowance.</p> <p>11 Q. And then if we can go to the other</p> <p>12 report --</p> <p>13 A. Okay.</p> <p>14 Q. -- A Comparison of Albuterol Sulfate</p> <p>15 Prices, if we look under the Executive Summary,</p> <p>16 under Purpose, the Purpose states: To assess the</p> <p>17 appropriateness of the amount Medicare allows for</p> <p>18 albuterol sulfate, a prescription inhalation drug</p> <p>19 used in nebulizers.</p> <p>20 And then under Background, the third</p> <p>21 paragraph, the report states: We surveyed</p> <p>22 pharmaceutical buying groups, mail order</p>
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<p>1 BY MR. TORBORG:</p> <p>2 Q. And at the out -- at the outset --</p> <p>3 MR. TORBORG: I want to skip that one</p> <p>4 too. Let's go to the next two.</p> <p>5 BY MR. TORBORG:</p> <p>6 Q. I'd like to start off by handing you a</p> <p>7 couple of the reports that your office did.</p> <p>8 THE WITNESS: Thank you. Thank you.</p> <p>9 MR. TORBORG: For the record, I've handed</p> <p>10 Mr. Vito copies of Exhibit Abbott 030, which is the</p> <p>11 June 1996 OIG report titled, Suppliers' Acquisition</p> <p>12 Costs for Albuterol Sulfate; as well as Exhibit</p> <p>13 Abbott 060, which is a June 1996 OIG report titled,</p> <p>14 A Comparison of Albuterol Sulfate Prices.</p> <p>15 BY MR. TORBORG:</p> <p>16 Q. Mr. Vito, I believe you'll tell me that</p> <p>17 you're familiar with these reports and that they</p> <p>18 were prepared under -- under your direction, in</p> <p>19 your office. Is that right?</p> <p>20 A. Yes, sir.</p> <p>21 Q. And just to try to orient ourselves to</p> <p>22 the reports, if we go to Exhibit Abbott 030, the</p>	<p>1 pharmacies, and retail pharmacy stores and compared</p> <p>2 their prices for generic versions of albuterol</p> <p>3 sulfate to the amount that Medicare allows.</p> <p>4 Did I read that right?</p> <p>5 A. Yes.</p> <p>6 Q. And were you involved in these two</p> <p>7 reports?</p> <p>8 A. Yes.</p> <p>9 Q. Now, both of these reports have a number</p> <p>10 and a report 94 --</p> <p>11 A. Yes.</p> <p>12 Q. -- correct? And --</p> <p>13 A. Yes.</p> <p>14 Q. -- what -- what does that signify?</p> <p>15 A. It's the -- when we start a job, we're</p> <p>16 asked to give a -- get a CIN number, and this was</p> <p>17 the number that they provided to us. Generally</p> <p>18 speaking, it usually means that you started in '94;</p> <p>19 however, the -- the conventions used by our office</p> <p>20 did not always follow that -- that pattern.</p> <p>21 Q. Do you have any reason to believe that</p> <p>22 these two reports here that bear a 94 number did</p>

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

VOLUME II

IN RE: PHARMACEUTICAL : MDL NO. 1456
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION:
PRICE LITIGATION : 01-CV-12257-PBS
:
THIS DOCUMENT RELATES TO :
U.S. ex rel. Ven-A-Care of :
the Florida Keys, Inc. v. :
Abbott Laboratories, Inc. :
No. 06-CV-11337-PBS :

- - -

Continuation of the videotaped
deposition of ROBERT VITO was taken, pursuant
to notice, at MORGAN LEWIS & BOCKIUS, LLP,
1701 Market Street, Philadelphia,
Pennsylvania, on Wednesday, June 20, 2007,
beginning at 8:43 a.m., before M. Kathleen
Muino, Professional Shorthand Reporter, Notary
Public; Michael Hunterton, Certified Legal
Video Specialist, there being present:

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<p>1 drug, we believe current Medicare reimbursements</p> <p>2 more than compensate suppliers for these costs</p> <p>3 along with a reasonable profit margin.</p> <p>4 What did you believe was a reasonable profit</p> <p>5 margin for this drug?</p> <p>6 MR. NEAL: I'll object to the form.</p> <p>7 THE WITNESS: We -- we did not have a</p> <p>8 specific number in mind.</p> <p>9 BY MR. TORBORG:</p> <p>10 Q. But you believed that the supplier</p> <p>11 should have some profit margin?</p> <p>12 A. There would be no one in the business if</p> <p>13 there wasn't any incentive to have a profit.</p> <p>14 Q. Do you recall having any discussions at</p> <p>15 any time with anyone at OIG or HCFA about what a</p> <p>16 reasonable profit margin would be for albuterol</p> <p>17 sulfate?</p> <p>18 MR. NEAL: I'll object to the form.</p> <p>19 You can answer that to the extent that</p> <p>20 you don't disclose any communications that took</p> <p>21 place in entrance/exit conferences or other</p> <p>22 privileged settings.</p>	<p>1 Exhibit Abbott 240 is a copy of a regulation that,</p> <p>2 I believe, actually relates to the Medicaid</p> <p>3 program. I'm going to ask you to, if you would, go</p> <p>4 to the second page, to the Section 447.204,</p> <p>5 Encouragement of provider participation. Are you</p> <p>6 with me?</p> <p>7 A. Yes.</p> <p>8 Q. I'll read it in -- into the record. If</p> <p>9 you would follow along. That section provides:</p> <p>10 The agency's payments -- and I believe this is</p> <p>11 referring to a state agency given what comes before</p> <p>12 it on the page.</p> <p>13 The agency's payments must be sufficient to</p> <p>14 enlist enough providers so that services under the</p> <p>15 plan are available to recipients at least to the</p> <p>16 extent that those services are available to the</p> <p>17 general population.</p> <p>18 Mr. Vito, have you reviewed that regulation</p> <p>19 before today?</p> <p>20 MR. AZORSKY: Objection to form.</p> <p>21 THE WITNESS: This -- this -- this</p> <p>22 relates to Medicaid, and all the other lines of</p>
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<p>1 THE WITNESS: I think we had general</p> <p>2 discussions.</p> <p>3 BY MR. TORBORG:</p> <p>4 Q. What -- what do you remember about those</p> <p>5 discussions?</p> <p>6 A. That it was just, you know, discussions</p> <p>7 about what -- what should be a -- a markup.</p> <p>8 Q. What do you recall about what markup</p> <p>9 would be appropriate in those discussions?</p> <p>10 MR. NEAL: Object to the form.</p> <p>11 And my instruction stands.</p> <p>12 THE WITNESS: I -- I -- I don't remember</p> <p>13 all the details, but there were discussions about</p> <p>14 that, because we -- we believed that providers</p> <p>15 should be paid a fair price.</p> <p>16 MR. TORBORG: Can you get me Tab 181.</p> <p>17 ---</p> <p>18 (Whereupon, Exhibit Abbott 240 was marked</p> <p>19 for Identification.)</p> <p>20 ---</p> <p>21 BY MR. TORBORG:</p> <p>22 Q. Mr. Vito, what I've handed you as</p>	<p>1 questionings were Medicare.</p> <p>2 BY MR. TORBORG:</p> <p>3 Q. Yeah. I -- I'm switching over to</p> <p>4 Medicaid.</p> <p>5 A. Okay. So this is now focused on</p> <p>6 Medicaid?</p> <p>7 Q. Yes.</p> <p>8 A. Okay. I -- I -- I -- I believe -- I --</p> <p>9 I don't remember.</p> <p>10 Q. Do you recall having discussions about</p> <p>11 the fact that Medicaid regulations had a provision</p> <p>12 in them that required that the payment that the</p> <p>13 state plan provided for drugs needed to be enough</p> <p>14 to enlist enough providers --</p> <p>15 A. Yeah, yeah --</p> <p>16 Q. -- so that --</p> <p>17 A. -- I think we were certainly aware of</p> <p>18 that.</p> <p>19 MR. NEAL: I'll object to the form.</p> <p>20 You've answered.</p> <p>21 BY MR. TORBORG:</p> <p>22 Q. Do you recall discussions about that?</p>

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<p>1 THE WITNESS: In -- in -- in 199 -- in</p> <p>2 October 1st 1997, in -- in her response?</p> <p>3 BY MR. TORBORG:</p> <p>4 Q. Yes.</p> <p>5 A. I -- I -- I didn't see anything</p> <p>6 specifically in her response relating to albuterol</p> <p>7 sulfate, but I didn't look at it carefully.</p> <p>8 Q. And when you had conversations with HCFA</p> <p>9 about the fact that they had to reimburse based</p> <p>10 upon the prices in Red Book and other price</p> <p>11 listings, it wasn't limited to albuterol sulfate,</p> <p>12 was it?</p> <p>13 MR. NEAL: Object to the form of the</p> <p>14 question.</p> <p>15 THE WITNESS: When -- when we -- when we</p> <p>16 met with CMS on this report, it was specifically</p> <p>17 addressing this report. When we met with CMS on</p> <p>18 the other report, it was to specifically address</p> <p>19 that report.</p> <p>20 BY MR. TORBORG:</p> <p>21 Q. I think earlier you testified that you</p> <p>22 recalled some conversations with HCFA with respect</p>	<p>1 A. Okay.</p> <p>2 Q. And in your report, page little I --</p> <p>3 A. Yes.</p> <p>4 Q. -- Roman et I, you had indicated that:</p> <p>5 On January 1, 1998, Medicare Part B will begin to</p> <p>6 reimburse covered drugs at 95 percent of the</p> <p>7 average wholesale price. Correct?</p> <p>8 A. Yes, sir.</p> <p>9 Q. So that -- that's the date at which the</p> <p>10 regulation changed to no longer allow use of</p> <p>11 estimated acquisition cost, but then required the</p> <p>12 use of average wholesale price; is that right?</p> <p>13 A. I -- I -- I believe so, yes.</p> <p>14 Q. And do you recall having conversations</p> <p>15 after the Balanced Budget Act of 1997 or after</p> <p>16 January 1, 1998 about the fact that HCFA felt it</p> <p>17 was required to pay based upon the published prices</p> <p>18 in Red Book and other price listings?</p> <p>19 MR. NEAL: I'll object to the form.</p> <p>20 And again instruct you: You can answer</p> <p>21 that so long as you don't disclose the substance of</p> <p>22 any communications that took place in privileged</p>
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<p>1 to the fact that they felt that they had to pay</p> <p>2 based upon the average wholesale prices published</p> <p>3 in Red Book and other price listings?</p> <p>4 A. Yeah, I said depending upon what time it</p> <p>5 was --</p> <p>6 Q. Yeah, the time period.</p> <p>7 A. Yes. That --</p> <p>8 Q. Okay.</p> <p>9 A. Because even in her comments on October</p> <p>10 1st, 1997, they're talking about estimated -- it</p> <p>11 says: Contracted carriers determine the amount</p> <p>12 that Medicare will pay for its drugs based on the</p> <p>13 lower of the estimated acquisition cost or the</p> <p>14 national wholesale average price.</p> <p>15 Then it further defines estimated acquisition</p> <p>16 cost as the survey of actual invoice prices paid</p> <p>17 for the drug.</p> <p>18 Q. Which report are you referring to?</p> <p>19 A. The one that --</p> <p>20 Q. The '97 report?</p> <p>21 A. Yes, on Page D-2. Do --</p> <p>22 Q. Yeah, I see.</p>	<p>1 settings, such as the exit or entrance conferences.</p> <p>2 THE WITNESS: I'm -- I'm -- I -- I think</p> <p>3 we probably did.</p> <p>4 BY MR. TORBORG:</p> <p>5 Q. And were those conversations limited to</p> <p>6 albuterol sulfate, or did they apply to all drugs</p> <p>7 reimbursed by the Medicare program?</p> <p>8 MR. NEAL: I'll object to the form.</p> <p>9 You can answer.</p> <p>10 THE WITNESS: I think it depended upon</p> <p>11 when -- when we issue one report, we only talk</p> <p>12 about the findings that relate to that specific</p> <p>13 report. So that when we were talking about</p> <p>14 albuterol sulfate, it was focused mainly on</p> <p>15 albuterol sulfate. On the other -- in this</p> <p>16 particular report, the one in 1997, it was twenty</p> <p>17 of the top utilized drugs by dollar volume, so we</p> <p>18 would be talking about those in this -- in this</p> <p>19 report.</p> <p>20 Q. Did you have conversations with respect</p> <p>21 to the drugs of the 1997 report, where HCFA told</p> <p>22 you that they felt that they had to pay based upon</p>

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<p>1 the published prices in the compendia?</p> <p>2 MR. NEAL: Objection as to form.</p> <p>3 And, again, you can answer that</p> <p>4 consistent with my previous instruction on</p> <p>5 privilege.</p> <p>6 THE WITNESS: I -- I -- I don't remember.</p> <p>7 There might have been, but I -- I really don't</p> <p>8 remember. And, again, it's the -- the time frames</p> <p>9 also.</p> <p>10 MR. TORBORG: Let's do one more document,</p> <p>11 if we could, and then we'll break for lunch.</p> <p>12 MR. NEAL: That's fine.</p> <p>13 BY MR. TORBORG:</p> <p>14 Q. Mr. Vito, I'm going to hand you, as you</p> <p>15 correctly predicted --</p> <p>16 A. Thanks.</p> <p>17 Q. -- a later report. This is an OIG</p> <p>18 report titled Medicare Reimbursement of Albuterol,</p> <p>19 June of 2000. It indicates -- the report indicates</p> <p>20 it was also prepared under your direction. Is that</p> <p>21 right?</p> <p>22 A. Yes, sir.</p>	<p>1 that right?</p> <p>2 A. That's correct.</p> <p>3 Q. Do you have a sense of what the -- what</p> <p>4 would \$0.47 per milligram translate to per</p> <p>5 milliliter?</p> <p>6 A. I think it's in here, but I don't</p> <p>7 remember offhand.</p> <p>8 Q. I think it is too. I was hoping you</p> <p>9 could tell me to save time.</p> <p>10 A. I -- I -- I can't remember offhand, but</p> <p>11 I know we had numerous discussions in my office to</p> <p>12 make sure that that was handled properly.</p> <p>13 MR. TORBORG: The collective masses are</p> <p>14 invited to point it out if they find it.</p> <p>15 THE WITNESS: Okay. I think it might be</p> <p>16 in the Methodology. Conversion of prices, on Page</p> <p>17 8.</p> <p>18 BY MR. TORBORG:</p> <p>19 Q. With that guidance, do you have a sense</p> <p>20 for how \$0.47 per milligram would translate to a</p> <p>21 per-milliliter amount?</p> <p>22 A. It says by dividing the Medicaid Federal</p>
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<p>1 Q. And in this report, you found -- or the</p> <p>2 purpose of this report was to compare the amount</p> <p>3 that Medicare reimburses for albuterol with the</p> <p>4 amounts reimbursed by Medicaid and the Department</p> <p>5 of Veterans Affairs and prices available at</p> <p>6 pharmacies; is that right?</p> <p>7 A. Yes.</p> <p>8 Q. And what you concluded is that Medicare</p> <p>9 at that point was allowing \$0.47 per milligram; is</p> <p>10 that right?</p> <p>11 A. I'll go and look at the chart. I'm</p> <p>12 sorry, I --</p> <p>13 Q. It's on the bottom of Page 1 of the</p> <p>14 Executive Summary.</p> <p>15 A. Okay. 47, yes.</p> <p>16 Q. And the VA was able to purchase</p> <p>17 albuterol in its generic form through the Federal</p> <p>18 Supply Schedule for \$0.07 per milligram; is that</p> <p>19 right?</p> <p>20 A. Yes.</p> <p>21 Q. And per milligram is -- is not</p> <p>22 necessarily the same thing as per milliliter; is</p>	<p>1 Upper Limit price of \$0.20 per milliliter by 0.823,</p> <p>2 we calculated the Medicaid upper limit payment</p> <p>3 equals \$0.24 per milligram. So apparently we</p> <p>4 converted the milliliters to milligrams. But,</p> <p>5 again, I -- I don't remember offhand on this, but I</p> <p>6 do remember that we tried to do it right.</p> <p>7 Q. Okay. And I'm sure you guys did.</p> <p>8 A. Thank you.</p> <p>9 Q. And you also determined that the Federal</p> <p>10 Upper Limit for albuterol was \$0.24 per milligram?</p> <p>11 That's on Page 2, I think.</p> <p>12 A. Yes. Medicare's reimbursement amount</p> <p>13 was almost double the \$0.24 per milliliter, yes --</p> <p>14 or gram.</p> <p>15 Q. Do you know when it was that HCFA</p> <p>16 implemented an Federal Upper Limit for albuterol</p> <p>17 sulfate in this dosage?</p> <p>18 A. There -- there is -- I don't remember</p> <p>19 the exact date on this, but I do remember that</p> <p>20 there were times when there was a Federal Upper</p> <p>21 Limit price and then there were also times that</p> <p>22 there were not a Federal Upper Limit price for this</p>

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<p>1 Q. Starting with the -- the first part of</p> <p>2 the article, in the first column, where the type</p> <p>3 gets really small, and I'll -- I'll do the favor of</p> <p>4 reading it --</p> <p>5 A. Thank you.</p> <p>6 Q. -- because it -- it will be even</p> <p>7 difficult for me to read it, but I'll do my best.</p> <p>8 A. As you get older, it's harder to see.</p> <p>9 Q. It's starting to get for me as well. For</p> <p>10 many drugs, especially the growing number coming</p> <p>11 off patent and going generic, the drug providers</p> <p>12 actually pay wholesale prices that are 60 to 90</p> <p>13 percent below the so-called average wholesale</p> <p>14 price, or AWP, used in reimbursement claims.</p> <p>15 When did you become aware of the fact that</p> <p>16 there were -- that generic drugs were being sold to</p> <p>17 providers at amounts 60 to 90 percent below average</p> <p>18 wholesale prices?</p> <p>19 MR. NEAL: I'll object to the form of the</p> <p>20 question.</p> <p>21 THE WITNESS: I think we became -- I</p> <p>22 mean, of course, this article pointed it out, but I</p>	<p>1 to be such a difference between the actual selling</p> <p>2 price and average wholesale prices?</p> <p>3 MR. NEAL: I'll object to the form and</p> <p>4 just instruct the --</p> <p>5 Instruct you that you can answer that</p> <p>6 question consistent with my previous instructions</p> <p>7 not to disclose the substance of any communications</p> <p>8 that took place at entrance or exit conferences</p> <p>9 with CMS.</p> <p>10 THE WITNESS: Could you restate the</p> <p>11 question now? I -- I -- I totally --</p> <p>12 MR. NEAL: That's a lengthy instruction.</p> <p>13 THE WITNESS: Yeah.</p> <p>14 MR. NEAL: I apologize.</p> <p>15 BY MR. TORBORG:</p> <p>16 Q. Did you have any global discussions</p> <p>17 about generic drugs in general with CMS --</p> <p>18 A. Well --</p> <p>19 Q. Let me finish.</p> <p>20 A. I'm sorry.</p> <p>21 Q. -- regarding the fact that there was a</p> <p>22 -- a larger difference between the actual selling</p>
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<p>1 think we also, our work in albuterol sulfate, which</p> <p>2 is the generic, demonstrated some of those issues</p> <p>3 as well, as well as some of the other work that we</p> <p>4 have done here. I believe at this time Leucovorin</p> <p>5 was also a generic, so there were other generic</p> <p>6 products that we had seen and seen some pricing</p> <p>7 variations on.</p> <p>8 BY MR. TORBORG:</p> <p>9 Q. Do you recall discussions with CMS</p> <p>10 officials in this time frame about the fact that</p> <p>11 generic drugs were selling at amounts 60 to 90</p> <p>12 percent below the so-called average wholesale</p> <p>13 prices?</p> <p>14 MR. NEAL: Objection as to form.</p> <p>15 THE WITNESS: I believe when we issued</p> <p>16 our reports, the reports pointed out that the</p> <p>17 products were selling below the -- the AWP and that</p> <p>18 clearly some of the products were generic.</p> <p>19 BY MR. TORBORG:</p> <p>20 Q. Did you have a more global discussion</p> <p>21 about generic drugs in general and what was causing</p> <p>22 many of those drugs to sell at prices -- for there</p>	<p>1 prices to providers and the published average</p> <p>2 wholesale price?</p> <p>3 MR. AZORSKY: Object to the form.</p> <p>4 MR. NEAL: I object to the form as well.</p> <p>5 And you heard my previous instruction.</p> <p>6 THE WITNESS: I -- I -- I believe that we</p> <p>7 -- our reports spoke for themselves, in that there</p> <p>8 were some products that were generics that were --</p> <p>9 that had that difference, and there were also some</p> <p>10 brand name products that had that difference as</p> <p>11 well. And, again, it was each -- each report stood</p> <p>12 on its own merit. Albuterol, I think that you</p> <p>13 showed me we probably did at least -- I saw at</p> <p>14 least four of the ones that we did, and they were</p> <p>15 generic drugs, and we were showing what was going</p> <p>16 on in that.</p> <p>17 In addition to that, I -- I -- the</p> <p>18 excessive Medicare reimbursement report, I believe</p> <p>19 that also pointed out some problems both with the</p> <p>20 brand name products and the generic products.</p> <p>21 BY MR. TORBORG:</p> <p>22 Q. And we'll -- we'll get into the 1997</p>

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<p>1 A. I don't recall it, but I -- I -- I'm 2 sure I read it. 3 Q. If I could ask you to go to the bottom 4 of the first column, last paragraph, it starts, 5 With drugs? 6 A. Uh-huh. 7 Q. The article states: With drugs such as 8 albuterol and infusion drugs, quote, there is a 9 profit margin, end quote, notes Tim Redmon, with 10 the National Community Pharmacists Association. He 11 adds that, after last year's small reduction, 12 industry observers, quote, at least suspected that 13 somebody would come back for more cuts. That's 14 exactly what's happening now. End quote. 15 Then there's a section that says, HCFA Can 16 Develop a Dispensing Fee, where the article states: 17 In addition to reducing the reimbursement for 18 prescription drugs to 95 percent of the average 19 wholesale price, the 1998 budget gave the Health 20 Care Financing Administration the authority to 21 develop a dispensing fee for those drugs, notes 22 Attorney Alan Parver with Powell, Goldstein, Frazer</p>	<p>1 effect, Mr. Vito, from HCFA officials that claimant 2 -- that payment for services was built into the fee 3 schedule for prescription drugs? 4 MR. NEAL: I'll object to the form. 5 And just instruct you that you can answer 6 that to the extent you don't implicate any 7 privileged communications with HCFA officials. 8 THE WITNESS: I -- I -- I am not certain 9 on -- on that. I -- I -- I -- I don't know for 10 sure if that's what was discussed or if they said 11 that the cost is -- is -- that the reimbursement is 12 the reimbursement, so I don't -- I -- I don't 13 recall. 14 THE VIDEOGRAPHER: Excuse me, Counsel. 15 Whoever just joined the conference call, 16 if you'll please put your phone on mute; we're 17 getting a feedback echo on this end. 18 My apologies. 19 BY MR. TORBORG: 20 Q. So are -- are you not -- not certain it 21 was discussed, or you just -- 22 A. I -- I am --</p>
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<p>1 and Murphy in Washington, DC. That authority is 2 something we could certainly use to develop our 3 educational efforts with HCFA, Parver notes. 4 Pharmacies, infusion providers, and DME 5 dealers need to teach HCFA more about what they do 6 and what services they render, since Medicare 7 currently does not pay at all for services in 8 addition to drugs, Parver insists. 9 Quote, it's unclear to me how, if an entity is 10 paid its acquisition cost for a drug, it could 11 possibly provide any services, Parver adds. In the 12 infusion area, that would probably make it very 13 difficult for a pharmacy to provide any services. 14 In the past, Redmon claims, Medicare officials 15 would argue that the service component was, quote, 16 built into the fee schedule for prescription drugs. 17 Now that this component may be removed, Medicare's 18 insistence that it, quote, won't pay for services, 19 end quote, means that the providers are left unable 20 to service beneficiaries, he maintains. 21 I wanted to read all of that just to give you 22 the -- the context. Do you recall comments to the</p>	<p>1 Q. -- don't know -- 2 A. I -- 3 MR. PAUL: Objection. 4 THE WITNESS: I don't totally recall and 5 that the answer to your question [sic]. I'm not 6 sure. 7 BY MR. TORBORG: 8 Q. Have you ever heard the term cross 9 subsidize? 10 A. I have. 11 Q. And in what context? 12 A. I believe that in the prescription drug 13 work, they said that -- I -- I -- I -- I heard that 14 prices, excessive prices for the ingredient cost 15 would be used to help subsidize the other side. 16 Q. And who is "they"? 17 A. I believe that that was mentioned at the 18 hearing, and I don't know exactly who -- who talked 19 about that at the hearing. 20 THE VIDEOGRAPHER: Excuse me, Counsel, 21 we're still getting a feedback on the audio. Do 22 you want me to --</p>

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<p>1 MR. TORBORG: I'm just about done.</p> <p>2 THE VIDEOGRAPHER: -- get an operator on</p> <p>3 the phone?</p> <p>4 MR. McDONALD: Well, yeah, but, David,</p> <p>5 it's going to terrible. Why don't you just mute it</p> <p>6 or something? It's going to be worthless to have</p> <p>7 the video and not -- I mean, I can hear the</p> <p>8 feedback back here. Just mute the conference call.</p> <p>9 ---</p> <p>10 (Whereupon, the telephone was muted.)</p> <p>11 ---</p> <p>12 BY MR. TORBORG:</p> <p>13 Q. And do you recall who it was that made</p> <p>14 the comment at the hearing?</p> <p>15 A. I don't recall, but I do believe that</p> <p>16 that was mentioned at -- at the -- at the hearing.</p> <p>17 It might have been GAO or it might have been -- I</p> <p>18 don't know exactly who it was, but there is a</p> <p>19 record of the hearing. I believe it was in -- in</p> <p>20 2001, either September or October.</p> <p>21 Q. Was that concept ever discussed at the</p> <p>22 state pharmacy association meetings that you</p>	<p>1 inadequate payment for services?</p> <p>2 MR. NEAL: You can answer that consistent</p> <p>3 with my previous instruction on privileged</p> <p>4 communications with HCFA officials.</p> <p>5 THE WITNESS: I think it --</p> <p>6 MR. AZORSKY: Objection to form.</p> <p>7 THE WITNESS: I think it was -- in our</p> <p>8 later reports, we mention that in the conclusion or</p> <p>9 the recommendation, so I think there was -- that</p> <p>10 was definitely, I believe, in a public document</p> <p>11 from the OIG.</p> <p>12 BY MR. TORBORG:</p> <p>13 Q. With -- without revealing to me the</p> <p>14 substance of the communications, was that a -- a</p> <p>15 topic that was discussed at the exit conferences</p> <p>16 that you had with HCFA?</p> <p>17 MR. NEAL: You can answer that question</p> <p>18 yes or no.</p> <p>19 THE WITNESS: Hmph.</p> <p>20 MR. NEAL: Or I -- or I don't remember.</p> <p>21 MR. AZORSKY: Objection to form.</p> <p>22 THE WITNESS: I don't remember.</p>
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<p>1 attended?</p> <p>2 A. The -- the -- again, you're talking</p> <p>3 about the Medicare context of -- and then the other</p> <p>4 -- the state representatives are the Medicaid. So</p> <p>5 I believe that the Medicaid, we mainly talked about</p> <p>6 the AWP issues. We did not -- in our reports, we</p> <p>7 did not talk about the Medicare issues with them</p> <p>8 unless it had to do with J codes, in which they</p> <p>9 were being billed to the Medicaid program.</p> <p>10 Q. Do you recall discussions at the state</p> <p>11 pharmaceutical meetings that you attended that the</p> <p>12 payment for ingredient costs would subsi --</p> <p>13 subsidize an insufficient dispensing fee?</p> <p>14 MR. NEAL: Objection as to form.</p> <p>15 THE WITNESS: I -- I think there has</p> <p>16 always been questions about the dispensing fee and</p> <p>17 if it's proper or not, so there probably was some</p> <p>18 discussions about that.</p> <p>19 BY MR. TORBORG:</p> <p>20 Q. And do you recall any conversations with</p> <p>21 HCFA relating to the Medicare side about whether or</p> <p>22 not the payment for ingredient cost would subsidize</p>	<p>1 MR. TORBORG: Why don't we break for the</p> <p>2 day.</p> <p>3 MR. NEAL: That's fine.</p> <p>4 MR. TORBORG: Thank you very much, Mr.</p> <p>5 Vito, for your time.</p> <p>6 THE VIDEOGRAPHER: The time is 4:34 p.m.</p> <p>7 We're going off the record, concluding this day's</p> <p>8 testimony, consisting of six tapes in the</p> <p>9 deposition of Robert Vito, in the matter of In Re:</p> <p>10 Pharmaceutical Average Wholesale Price Litigation.</p> <p>11 This -- this day of testimony consists of six tapes</p> <p>12 and will be held by Henderson Legal Services of</p> <p>13 Washington, DC.</p> <p>14 ---</p> <p>15 (Whereupon, the deposition adjourned at</p> <p>16 4:35 p.m.)</p> <p>17 ---</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

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